STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of CHERYL JANES, LISA JANES, and KEITH JANES, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

MARY JANES,

Respondent-Appellant,

and

DUANE JANES,

Respondent.

UNPUBLISHED
October 14, 2003

No. 247456
Oakland Circuit Court
Family Division
LC No. 02-670415-NA

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FAMILY INDEPENDENCE AGENCY,

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Oakland Circuit Court
Family Division
LC No. 02-670415-NA

Before: Kelly, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal as of right from the trial court's order terminating their parental rights to the minor children. Respondent Mary Janes' parental rights were terminated pursuant to MCL 712A.19b(3)(g) and (j), and respondent Duane Janes' parental rights were terminated pursuant to MCL 712A.19b(3)(b)(i), (g), (j), (k)(ii), and (n). We affirm.

I

Respondent Mary Janes ("Mary") argues that the trial court erred in finding clear and convincing evidence of the statutory grounds to terminate her parental rights. We disagree.

In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met by clear and convincing evidence. *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991). This Court reviews the trial court's findings of fact under the clearly erroneous standard. MCR 5.974(I); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Under this standard, the court's decision "must strike [the reviewing court] as more than just maybe or probably wrong." *In re Trejo*, *supra* at 356, quoting *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). A finding is clearly erroneous if, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been made. *In re Miller*, *supra* at 337.

MCL 712A.19b(3) sets forth the statutory grounds for termination of a respondent's parental rights. Here, the trial court found that termination of Mary's parental rights was warranted under MCL 712A.19b(3)(g) and (j), which provide for termination under the following circumstances:

> (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.
>
> * * *
>
> (j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

The trial court provided two reasons for its finding that Mary failed to provide proper care and custody for her children. The first reason was that Mary failed to ensure that the home was fit for the two girls without being subjected to physical or sexual abuse. The court found that, although Mary did not know about the sexual abuse, she nevertheless should have known that the children were at risk because she knew of respondent Duane Janes ("Duane")'s past criminal sexual conduct history before she married him and before he adopted the three children.

Accordingly, the court determined that Mary should have been more strict in monitoring what occurred in the household. The second reason articulated by the court was that the evidence established that Mary had expressly stated that she would choose respondent Duane over her children and that she actually demonstrated her choice when she secured the bond for Duane's release when he was charged with sexually assaulting one of their daughters.

As to the first reason articulated by the trial court, Mary argues that Duane's criminal record was presumably available to the state government during the adoption proceedings. She asserts that, had the state government doubted whether Duane posed any threat to the girls, it would not have allowed him to adopt the children. She also asserts that, because there was no evidence whatsoever that she was aware of the sexual abuse being committed by Duane against the younger daughter, the court erred in concluding that she should have known that the girls were at risk.

We conclude that the trial court did not err in finding that Mary should have been aware that the girls were at risk. There was no evidence related to the nature of the adoption proceedings and it is unknown whether Duane's criminal history was ever checked in those proceedings. However, the evidence did establish instances where the elder daughter acted out to the point of inflicting self-mutilation. Duane had frequently called the police to intervene with problems with the elder daughter. The elder daughter testified that Mary looked into the bedroom when Duane had struck her in the nose but did nothing to stop the act or comfort her daughter. Mary's own witness, a family therapist, testified that respondents made a scapegoat out of the elder daughter, placing most of the blame for the family problems on her and requiring that she change her behavior and attitude without changing their own behavior. Although the evidence on this record establishes no knowledge on the part of respondent Mary that sexual abuse of the younger daughter had been taking place for about three years, the evidence establishes that Mary should have known, at the least, about the physical abuse. We cannot say that the court erred in finding that Mary failed to ensure that her home was conducive to the provision of proper care and custody for the children.

As to the second reason articulated by the trial court, Mary argues that petitioner failed to prove by clear and convincing evidence that the children would be harmed if returned to her home. She argues that her alleged statement to the children that she would chose Duane over the children was made out of frustration, in response to one of the elder daughter's tantrums and after the elder daughter stated that she wanted to "get rid of my dad and make the two [respondents] split up." Mary appears to argue that this should not have been a basis for the court's determination. We disagree. The proceedings below presented a question regarding Mary's choice between her husband and her children. The record indicates that the court used Mary's statement in the context of its determination that Mary had actually acted upon that statement and chose her husband over the children when she posted bond for Duane's release from jail. As the court concluded, this was indicative of Mary's unwillingness to ensure the safety of her children from harm. The court did not clearly err when is stated that respondent had taken a fairly adamant position to stand by Duane and assist him rather than the children.

Respondent Mary asserts that she posted the bond for her husband at the time when he was under the presumption of innocence and when the children had already been removed from the home and both respondents were prohibited from contacting the children. She states that, had there been a possibility of contact with the children, "perhaps" she would have acted

differently. There is nothing in this record to indicate that there was "no possibility of contact" with the children or that contact was prohibited indefinitely. As the trial court indicated, by her action, Mary helped create the situation where the children could not possibly be returned to their home. We find no clear error in the court's determination that Mary's actions established her choice of her husband over the safety of her children.

Respondent Mary next argues that the trial court should not have placed weight on the fact that she smiled when her younger daughter gave an emotional testimony about the sexual abuse she was subjected to by her step-father. Here, the court expressly indicated that it was not "putting definite stock" on respondent's demeanor and body language that it observed. The court stated that the smile may have been a result of nervousness or embarrassment, but it found that the gesture was consistent with her position that even despite the fact that her husband had a criminal conviction and served time for criminal sexual conduct and was arrested for allegations of sexual conduct on her daughter, Mary still bonded him out, returning him to the home and creating or helping to create a situation where the children could not be returned to her home at the time. Given the above, the court did not err in finding that Mary failed to provide proper care and custody for her children, that there was no reasonable likelihood that Mary would be able to provide proper care and custody, or that the children would not likely be harmed if returned to her care. Accordingly, the court did not clearly err in its determination to terminate Mary's parental rights under both MCL 712A.19b(3)(g) and (j).

II. The Best Interests of the Children

Respondent Mary next argues that the trial court erred in determining that the termination of her parental rights was in the best interests of the children. We disagree.

When the petitioner establishes by clear and convincing evidence that a statutory basis for termination exists, the court must order termination of parental rights unless it finds from evidence on the record that termination is not in the child's best interests. MCL 712A.19b(5); *Trejo, supra* at 353. This Court reviews the best interest decision for clear error. *Id*. at 356-357.

Much of Mary's argument is a reiteration of her claim that the evidence did not support termination, such as her defense of her decision to post bond for Duane and her claim that her elder daughter's problems were attributable to past trauma from the previous termination action against the children's biological mother. The pertinent question, however, is whether the evidence showed that termination was not in the children's best interests. The only evidence that the children would be better off with Mary's parental rights intact was the opinion testimony of respondents' own witnesses, consisting of their friends and relatives. This Court recognizes that the trial court, while not infallible, is in a better position to weigh evidence and evaluate a witness' credibility. *Fletcher v Fletcher (After Remand)*, 229 Mich App 19, 29; 581 NW2d 11 (1998). Accordingly, the court did not err in finding that these witnesses' testimony was not sufficient to establish that termination was not in the children's best interests.

Mary also argues that the children, one with severe emotional disturbance, are unlikely to find adoptive homes due to their age. However, there was no evidence on the record regarding the children's prospects for adoption. Although Mary's assessment of adoption prospects is probably accurate, it does not follow that the children are better off in an abusive home than they would be in foster care.

III

Both respondents argue that the trial court erred by prohibiting them from presenting testimony regarding the children's therapy. They claim that, as parents, they retained the right to waive the counselor-client privilege on their children's behalf before the children were adjudicated wards of the court.

In order to raise an issue on appeal that the trial court erred in excluding evidence, the party must make an offer of proof showing the substance of the evidence. MRE 103(a)(2). Here, neither respondent made an offer of proof regarding the privileged matters they intended to explore. On the contrary, Mary emphasized to the court that she did not intend to delve into privileged communications. She thus tacitly agreed with the children's attorney's argument that she had the right to assert the privilege on their behalf. Accordingly, appellate relief is not warranted.

Respondents also contend that the trial court erred in denying Mary's motion for an adjournment when the elder daughter's therapist, Dr. Sendi, failed to appear, or in failing to issue a warrant for his arrest for violating a subpoena. A witness' failure to comply with a subpoena may be considered contempt of court. MCR 2.506(E)(1). MCL 600.1701(i) provides that a trial court has the "power to punish by fine or imprisonment" persons who refuse or neglect to obey a subpoena. A trial court has discretion to determine the appropriate remedy for contempt. *People v Ahumada*, 222 Mich App 612, 617-618; 564 NW2d 188 (1997). A trial court's decision on a motion for an adjournment also is reviewed for an abuse of discretion. *Soumis v Soumis*, 218 Mich App 27, 32; 553 NW2d 619 (1996).

We conclude that the trial court did not abuse its discretion in either denying the motion to adjourn or in declining to issue an arrest warrant. Mary conceded that Dr. Sendi's testimony would have been similar to the testimony of the other therapists, and added only that it would be slightly different. Because the proffered testimony would have been cumulative to other testimony, and because these proceedings had been considerably delayed, the court did not abuse its discretion by concluding the proceedings without Dr. Sendi's testimony.

IV

Respondents argue that the trial court violated the Indian Child Welfare Act ("ICWA"), 25 USC 1901 *et seq*., by failing to notify an Indian tribe or the Secretary of the Interior that the children might be eligible for membership in an Indian tribe. Because notice provisions under the ICWA are mandatory, issues regarding compliance may be raised for the first time on appeal. *In re TM (After Remand)*, 245 Mich App 181, 188; 628 NW2d 570 (2001). Issues regarding the application of the ICWA present questions of law that this Court reviews de novo. *In re SD*, 236 Mich App 240, 243; 599 NW2d 772 (1999).

As required by MCR 5.965(B)(7), the trial court questioned respondents about affiliation with an Indian tribe. Duane replied that his grandfather's mother was an Indian. Although the court did not further question him about eligibility for tribal membership, it is undisputed that Duane is not the biological father of the children; he adopted the children after he married Mary. The ICWA requires the court to notify the tribe or Secretary of the Interior "where the court knows or has reason to know that an Indian child is involved . . . ." 25 USC 1912(a). Because

non-biological children are clearly excluded from the ICWA's coverage and there was nothing to show possible eligibility for tribal membership, 25 USC 1903(4), Duane's response to the court's inquiry did not give the court any reason to conclude that an Indian child might be involved. Thus, the court was not obligated to notify the Secretary of the Interior or any Indian tribe.

V

Respondent Duane argues, on grounds of relevance, that the trial court erred in admitting evidence of his 1982 conviction for first-degree criminal sexual conduct. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998). Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401; *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). Generally, all relevant evidence is admissible, unless otherwise provided by law, and evidence which is not relevant is not admissible. *Id.*; MRE 402. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403; *Aldrich*, *supra*.

Evidence that Duane had previously been convicted of criminal sexual conduct was highly relevant to these proceedings, both to support petitioner's theory that Mary had knowledge of Duane's propensity for sexual crimes, and to show a prior conviction as a basis for termination under MCL 712A.19b(3)(n)(i). The age of the conviction was pertinent to the weight the evidence should be given, but not to the question of whether it was relevant. The trial court did not abuse its discretion in admitting the evidence.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot